



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 120606145-2251-01]

RIN 0648-BB75

Atlantic Highly Migratory Species; North and South Atlantic Swordfish Quotas and Management Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule implements the International Commission for the Conservation of Atlantic Tunas (Commission) Recommendation 11-02, which maintains the U.S. North Atlantic swordfish base quota allocation, reduces the annual underharvest carryover from 50 to 25 percent of the base quota, establishes an quota transfer to Morocco for 2012 and 2013, and includes an alternative swordfish minimum size of 25-inches cleithrum to caudal keel (CK). This final rule also implements Recommendation 09-03 for South Atlantic swordfish. It also allows fishermen to remove the bill of the swordfish while still meeting the “head-naturally-attached” requirement for measuring swordfish using the lower jaw fork length minimum size, modifies and clarifies regulations regarding swordfish fishery season closures and the North Atlantic swordfish quota reserve category, and adjusts the North and South Atlantic swordfish quotas for the 2012 fishing year to account for 2011 underharvests and landings. This final rule could affect commercial and

recreational fishermen who are fishing for swordfish in the Atlantic Ocean, including the Caribbean Sea and Gulf of Mexico.

DATES: Effective on August 30, 2012.

ADDRESSES: Copies of the supporting documents—including the 2012 Environmental Assessment, Regulatory Impact Review, and Final Regulatory Flexibility Analysis, the 2007 Environmental Assessment, Regulatory Impact Review, Final Regulatory Flexibility Analysis, and the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP)—are available from the HMS website at <http://www.nmfs.noaa.gov/sfa/hms/>.

FOR FURTHER INFORMATION CONTACT: Steve Durkee by phone: 202-670-6637, or Delisse Ortiz by phone: 301-427-8503 or by fax: 301-713-1917.

SUPPLEMENTARY INFORMATION: The U.S. North and South Atlantic swordfish fisheries are managed under the 2006 Consolidated HMS FMP, its amendments, and its implementing regulations at 50 CFR part 635, pursuant to the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Atlantic Tunas Convention Act (ATCA). Under ATCA, the Secretary shall promulgate such regulations as may be necessary and appropriate to carry out Commission recommendations.

In November 2011, the Commission adopted Recommendation 11-02 for North Atlantic swordfish. This recommendation was adopted by the Commission based on the most recent North Atlantic swordfish stock assessment and maintains the U.S. baseline quota of 2,937.6 metric tons (mt) dressed weight (dw) for 2012 and 2013. Previous Commission recommendations for North Atlantic swordfish included a quota transfer of 18.8 mt dw from the United States to Canada; however, Recommendation 11-02 eliminates this quota transfer and includes a transfer of 112.8 mt dw from the United States to Morocco to support joint scientific

research and Morocco's efforts to eliminate the use of driftnets. Recommendation 11-02 also includes a provision for the submission of annual swordfish management plans and a change to the underharvest carryover provisions. The recommendation limits the amount of underharvested quota that can be carried over by CPCs, including the United States, allocated a baseline quota greater than 500 mt from 50 to 25 percent of the baseline quota. All other CPCs are limited to an underharvest carryover limit of 50 percent of their baseline quota. This recommendation also includes an option for countries to use a CK minimum size measurement of 25 inches.

The proposed rule (77 FR 25669, May 1, 2012) and draft environmental assessment contained additional details regarding the impacts of the alternatives considered and a brief summary of the recent management history. Those details are not repeated here.

In this final action, NMFS maintains the U.S. base quota of 2,937.6 mt dw for North Atlantic swordfish, implements the quota transfer of 112.8 mt dw from the United States to Morocco for 2012, and reduces the North Atlantic swordfish underharvest carryover from 50 to 25 percent of the base quota pursuant to Recommendation 11-02. For South Atlantic swordfish, this action implements Recommendation 09-03, which set the 2012 U.S. South Atlantic swordfish quota at 100 mt ww (75.2 mt dw), limits the U.S. carryforward of underharvest to 75 mt dw, and authorizes the transfer of 50 mt ww (37.6 mt dw) to Namibia, 25 mt ww (18.8 mt dw) to Côte d'Ivoire, and 25 mt ww (18.8 mt dw) to Belize. In addition, this final action implements a new alternative 25-inch CK minimum size measurement per Recommendation 11-02 and allows the existing 47-inch lower jaw fork length measurement to apply to swordfish without a bill, provided the bill has been removed forward of the anterior tip of the lower jaw and the head is naturally attached. Finally, this final rule will allow NMFS to transfer quota

from the directed category to the incidental or reserve quota categories and use the quota in the reserve category to account for fishery research landings. This simplifies the North Atlantic swordfish reserve category description and explicitly states the annual reserve category allocation to be 50 mt dw. Additionally, the regulatory language is modified so that Commission-negotiated quota transfers of North Atlantic swordfish will be moved from the U.S. baseline quota rather than the reserve category.

## 2012 North and South Atlantic Swordfish Specifications

### A. North Atlantic Swordfish Quota

Recommendation 11-02 maintained the North Atlantic swordfish total allowable catch of 13,700 mt ww (10,301 mt dw) through 2013. Of this total allowable catch, the United States baseline quota is 2,937.6 mt dw (3,907.0 mt ww) per year. The recommendation includes a new 112.9 mt dw annual quota transfer to Morocco but does not continue the previous recommendation's quota transfer of 18.8 mt dw to Canada, and limits the underharvest carryover to 25 percent of the U.S. baseline quota. Therefore, the United States may carry over a maximum of 734.4 mt dw of underharvests from the previous year (2011) to be added to the 2012 baseline quota.

This final rule adjusts the U.S baseline quota for the 2012 fishing year to account for the annual quota transfer to Morocco and the 2011 underharvest. The 2012 North Atlantic swordfish baseline quota is 2,937.6 mt dw. The preliminary North Atlantic swordfish underharvest for 2011 was 2,208.3 mt dw, which exceeds the maximum carryover cap of 734.4 mt dw. Therefore, NMFS is carrying forward the maximum amount allowed per Recommendation 11-02. The baseline quota reduced by the 112.8 mt dw annual quota transfer to Morocco and increased by the underharvest carryover maximum of 734.4 mt dw equals 3,559.2 mt dw, which is the final

adjusted quota for the 2012 fishing year. From that final adjusted quota, the directed category will be allocated 3,209.2 mt dw and will be split equally into two seasons in 2012 (January through June, and July through December). The U.S. 2012 North Atlantic swordfish baseline quota is 2,937.6 mt dw. The baseline quota reduced by the 112.8 mt dw 2012 quota transfer to Morocco and increased by the allowable underharvest carryover maximum of 734.4 mt dw equals 3,559.2 mt dw, which is the final adjusted quota for the 2012 fishing year. From that final adjusted quota, the directed category will be allocated 3,209.2 mt dw and will be split equally into two seasons in 2012 (January through June, and July through December). The reserve category will be allocated 50 mt dw for inseason adjustments and fishery research, and 300 mt dw will be allocated to the incidental category, which includes recreational landings and catch by incidental swordfish permit holders for the 2012 fishing season, per § 635.27(c)(1)(i)(B) (Table 1).

#### B. South Atlantic Swordfish Quota

Recommendation 06-03 established the South Atlantic swordfish total allowable catch at 17,000 mt ww for 2007, 2008, and 2009. Of this, the United States received 75.2 mt dw (100 mt ww). As with the North Atlantic swordfish recommendation, Recommendation 06-03 established a cap on the amount of underharvest that can be carried forward. For South Atlantic swordfish, the United States is limited to carrying forward 100 percent (75.2 mt dw). The most recent South Atlantic swordfish measure, Recommendation 09-03, is a 3-year measure that reduced the total allowable catch to 15,000 mt dw but maintains the previous years' U.S. quota share of 75.2 mt dw (100 mt ww) and underharvest carryover limit through 2012.

Recommendation 09-03 also transfers a total of 75.2 mt dw (100 mt ww) of the U.S. South Atlantic swordfish quota to other countries. In 2011, U.S. fishermen did not land any

South Atlantic swordfish, therefore, 75.2 mt dw of underharvest is available to carry over to 2012 and can cover the entire 75.2 mt dw of annual international quota transfers outlined above. Therefore, the 2012 adjusted quota for South Atlantic swordfish is 75.2 mt dw (Table 1).

Impacts resulting from the 2012 North Atlantic swordfish specifications are analyzed in the final Environmental Assessment accompanying this rule. The Environmental Assessment that was prepared for the 2007 Swordfish Quota Specifications Final Rule published on October 5, 2007 (72 FR 56929) analyzed the impacts resulting from Recommendation 06-03 for South Atlantic swordfish.

Table 1. 2012 North and South Atlantic Swordfish Quotas

<b>North Atlantic Swordfish Quota (mt dw)</b>		<b>2012</b>
Baseline Quota		2,937.6
Quota Transfer to Morocco		(-)112.8
Total Underharvest from Previous Year <sup>+</sup>		2,208.3
Underharvest Carryover from Previous Year <sup>+</sup>		734.4
Adjusted Quota		3,559.2
Quota Allocation	Directed Category	3,209.2
	Incidental Category	300
	Reserve Category	50
<b>South Atlantic Swordfish Quota (mt dw)</b>		<b>2012</b>
Baseline Quota		75.2
International Quota Transfers*		(-)75.2
Total Underharvest from Previous Year <sup>+</sup>		75.2
Underharvest Carryover from Previous Year <sup>+</sup>		75.2
Adjusted quota		75.2

+ Underharvest is capped at 25 percent of the baseline quota allocation for the North Atlantic and 75.2 dw for the South Atlantic per Rec. 11-02

\* Under 09-03, 75.2 mt dw of the U.S. underharvest and base quota, as necessary, was transferred to Namibia (37.6 mt dw), Cote d'Ivoire (18.8 mt dw), and Belize (18.8 mt dw).

## Response to Comments

During the proposed rule stage, NMFS received 10 comments from non-governmental organizations, fishermen, dealers, and other interested parties. A summary of the major comments received for each proposed measure (swordfish quota measures, minimum size measures, and miscellaneous measures) on the proposed rule during the public comment period is shown below with NMFS' responses. All written comments submitted during the comment period can be found at <http://www.regulations.gov/> by searching for RIN 0648-BB75.

#### Swordfish Quota Measures

Comment 1: NMFS should implement the quota measures in Recommendation 11-02 in order to maintain compliance with the Commission. No underharvest should be carried over from one year to the next. The underharvest carryover limit should not be reduced from 50 percent to 25 percent of the base quota. NMFS should not transfer quota to other countries unless it gets something of value in return.

Response: NMFS agrees that it should implement the quota measures in Recommendation 11-02 in order to be compliant with the Commission's recommendations. NMFS does not agree, however, that it should not carryover allowable underharvest from one year to the next, where such carryover is consistent with Commission recommendations. The Commission's recommendations, including the provision to reduce the underharvest carryover limit from 50 to 25 percent, for this rebuilt stock take into consideration the health and status of the stock. Implementing the Commission-recommended U.S. North Atlantic swordfish baseline quota as well as the underharvest carry over and quota transfer to Morocco are consistent with Recommendation 11-02. Under the Atlantic Tunas Convention Act, the Secretary shall promulgate such regulations as may be necessary and appropriate to carry out the Commission's recommendations. The regulations as finalized appropriately carry out the Commission's

recommendations regarding the North Atlantic Swordfish stock, while meeting NMFS's legal obligations and management needs. During complex Commission negotiations, the U.S. delegation works to ensure that resource allocation, including quota transfers, considers domestic interests while ensuring the sustainable harvest of species under the Commission purview.

#### Minimum Size Measures

Comment 2: The 47 inch lower jaw fork length minimum size, and the equivalent dressed swordfish minimum size of 25 inches cleithrum to caudal keel, refers to a juvenile swordfish that is too small to be harvested.

Response: The Commission established the 47 inch lower jaw fork length minimum size in the 1999 North Atlantic swordfish rebuilding plan (Rec 99-02) based on advice from the Standing Committee on Research and Statistics (SCRS). Based on the SCRS's most recent stock assessment (2009), the 47 inch lower jaw fork length minimum size was deemed appropriate because it protected small swordfish from being harvested, helping to reduce mortality of immature swordfish. This minimum size has contributed to the successful rebuilding of the North Atlantic swordfish stock. The proposed alternative 25 inch cleithrum to caudal keel minimum length is equivalent to the 47 inch lower jaw fork length minimum size, and therefore is as appropriate for a minimum size as the current 47 inch lower jaw fork length measurement.

Comment 3: NMFS should implement the 25 inch cleithrum to caudal keel minimum size because the previous 29 inch cleithrum to caudal keel minimum size was inconsistent with the 47 inch lower jaw fork length measurement. The current 29 inch cleithrum to caudal keel minimum size required fishermen to sometimes leave the head attached which is hazardous, makes the fish difficult to handle, and can lead to inconsistent enforcement once the head is removed. NMFS



should implement the 25 inch cleithrum to caudal keel since it will increase the number of retained fish without reducing the minimum size.

Response: NMFS agrees that implementing the 25 inch cleithrum to caudal keel alternative minimum size measurement provides numerous benefits to fishermen without undermining protection of immature swordfish. In addition, NMFS is finalizing a definition of naturally attached, as used to describe the head of a swordfish, that allows for removal of the bill forward of the anterior tip of the lower jaw. A swordfish with its head naturally attached in this manner may be measured using the lower jaw fork length measurement to determine compliance with minimum size requirements. NMFS believes that these two changes should accommodate the operational needs of the U.S. swordfish fishery, including safety on board and storage efficiency, while also having the ancillary benefit of increased landings.

Comment 4: NMFS received two comments regarding the minimum weight standard. The first commenter stated that NMFS should not reintroduce minimum weight because it is too hard for fishermen to obtain an accurate weight at sea. Fishermen can only obtain accurate dressed weight once the fish is processed, precluding the live release of a fish that does not meet the minimum weight. The second commenter stated that NMFS should reintroduce the 33 lb minimum weight standard to give more flexibility to fishermen. Failure to retain all Commission-defined minimum size criterion is inconsistent with Atlantic Tunas Convention Act and the Magnuson-Stevens Act. NMFS is exceeding the Commission's recommendation by removing the minimum weight standard for United States fishermen.

Response: At this time, NMFS believes that the disadvantages of re-implementing the 33 pound minimum weight outweigh the benefits. Obtaining an accurate dressed weight at sea can be difficult and cannot be obtained until the swordfish is fully dressed, thus precluding the ability

to release an undersized swordfish alive. The minimum weight measurement was often used by fishermen when they encountered swordfish that were shorter than the 29 inch cleithrum to caudal keel measurement but potentially heavier than 33 pounds. However, NMFS believes that implementation of the 25 inch cleithrum to caudal keel measurement eliminates the need for the weight measurement as fish meeting the 33 pound minimum weight would almost certainly measure greater than 25 inches cleithrum to caudal keel. Furthermore, under the Atlantic Tunas Convention Act, the Secretary shall promulgate such regulations as may be necessary and appropriate to carry out ICCAT recommendations. ICCAT Recommendation 11-02 allows for discretion as to which minimum sizes to implement in each Party's domestic fisheries and does not require implementation of all the different options. Recommendation 11-02 offers the option for ICCAT Parties to implement a 25 kg live weight or in the alternative, a 125 cm lower jaw fork length minimum size with a 15 percent tolerance for incidentally caught smaller fish. Alternatively, ICCAT Parties can implement a 15 kg live weight or a 119 cm lower jaw fork length minimum size but may not avail themselves of the 15 percent tolerance for incidentally caught smaller fish. In addition, for swordfish that have been dressed, a cleithrum to caudal keel measurement of 63 cm can also be applied. NMFS believes that the preferred alternatives are fully compliant with Recommendation 11-02.

Comment 5: NMFS also received two comments regarding maintaining the lower jaw fork length minimum size. The first commenter stated that NMFS should maintain the lower jaw fork length minimum size because failure to retain all ICCAT-defined minimum size criterion is inconsistent with the Atlantic Tunas Convention Act and the Magnuson-Stevens Act. The second commenter stated that NMFS should remove the lower jaw fork length minimum size

because it would simplify compliance and enforcement with minimal impact on the number of retained swordfish.

Response: At this time, NMFS prefers to maintain the lower jaw fork length minimum size. As described in the comment above, Recommendation 11-02 provides the flexibility to use different minimum sizes and does not require the use of all the minimum sizes. NMFS also notes that removal of the lower jaw fork length minimum size could simplify compliance and enforcement since only one minimum size measurement would be needed rather than multiple landing-condition-specific minimum sizes. However, it is possible that removal of the lower jaw fork length minimum size could preclude the retention of some fish that meet the lower jaw fork length minimum size but not the cleithrum to caudal keel minimum size, even with the implementation of the alternative 25 inch cleithrum to caudal keel minimum size. In addition, the lower jaw fork length measurement is easier for recreational fishermen to obtain from a swordfish without removing the fish from the water. Recreational fishermen will often bring the swordfish to the side of the vessel and use the easier straight-line lower jaw fork length measurement to visually determine if the fish meets the lower jaw fork length minimum size. If the cleithrum to caudal keel measurement was the only minimum size measurement required, this may be more difficult for recreational fishermen and may increase swordfish handling time. In the future, if commercial and recreational fishermen begin to use only the cleithrum to caudal keel minimum size or it is found that that the lower jaw fork length minimum size is not needed, NMFS may consider the issue in a future rulemaking.

Comment 6: NMFS should estimate the impact of the 25 inches cleithrum to caudal keel minimum size on landings.

Response: In response to requests from commenters on the proposed rulemaking, NMFS analyzed the impact of implementing the 25 inch cleithrum to caudal keel minimum size under Alternative 3 in the Environmental Assessment. According to this analysis, approximately 51.4 mt dw (113,316 lbs dw) of swordfish greater than 47 inch lower jaw fork length could be landed as a result of the change in minimum size. However, this estimate is very rough and relies on a number of caveats that are more fully described in the Environmental Assessment. While there could be an increase in swordfish landings as a result of implementing Alternative 3, the increase in retained fish would come almost exclusively from legal fish that were previously discarded and not as a result of an increase in fishing effort.

Comment 7: NMFS should only implement the 25 inch cleithrum to caudal keel minimum size in the pelagic longline fishery since swordfish in this fishery have high at-vessel mortality. The 25 inch cleithrum to caudal keel minimum size should not be implemented in the recreational, buoy gear, or commercial handgear fisheries since it will result in greater handling time when measuring the fish leading to a decrease in live releases. In non-pelagic longline fisheries, the lower jaw fork length minimum size should be raised to 52 inches, rather than implementing a reduction in the cleithrum to caudal keel minimum size.

Response: This action strives to simplify swordfish minimum size regulations to the extent practicable without disadvantaging fishermen or harming the sustainability of the stock. NMFS believes that limiting the 25 inch cleithrum to caudal keel measurement to the pelagic fishery could unnecessarily complicate minimum size regulations and increase confusion in compliance and enforcement by requiring different minimum size measures across fishing sectors. Also, the swordfish handgear and recreational fisheries can continue to use the 47 inch lower jaw fork length measurement. Furthermore, there is no indication that the current 47 inch

lower jaw fork length minimum size, or an equivalent dressed swordfish cleithrum to caudal keel minimum size, is of a concern in the swordfish fishery. This minimum size has contributed to the successful rebuilding of the North Atlantic swordfish stock and there is no evidence that this minimum size is inappropriate as explained in Comment 2.

Comment 8: NMFS should not enforce the minimum size past the first point of landing. The second or third dealer or restaurant owners should not be responsible for minimum size requirements.

Response: Enforcement of minimum size requirements with respect to carcasses that are in the round, measureable form should not have any practical effect on the legal supply chain. Swordfish are monitored for compliance with minimum size requirements from the time they are landed until they are filleted, cut into steaks or processing in any way that physically alters the fish so it is not longer in round, measurable form. Limiting minimum size enforcement to fishermen and first dealers would preclude the ability to investigate violations further along the supply chain and limit NOAA's ability to enforce minimum size requirements.

#### Miscellaneous

Comment 9: Swordfish are experiencing overfishing and NMFS should prohibit fishing for the species. Fishermen should be strongly encouraged to release any live fish that are close to the minimum size and only retain those fish that cannot be returned to the sea alive.

Response: According to the 2009 swordfish stock assessment, the North Atlantic swordfish stock has been fully rebuilt under the rebuilding plan developed through the Commission. This minimum size has contributed to the successful rebuilding of the North Atlantic swordfish stock and there is no evidence that this minimum size is inappropriate. An assessment for North Atlantic swordfish is scheduled for 2013 and the Commission will take

appropriate action based on the results of this stock assessment, consistent with recommendations from the Standing Committee on Research and Statistics. NMFS strongly encourages fishermen to only retain legal-size fish and has developed catch and release guideline material to educate and encourage the catch and release of saltwater pelagic fish, including swordfish, in order to maximize their survival.

Comment 10: NMFS needs to reconsider the pelagic longline closed areas. The 29 inch cleithrum to caudal keel minimum size led to several pelagic longline closed areas, particularly off the coast of Florida. This area was closed to pelagic longline fishing primarily based on regulatory discards of undersized swordfish using the larger 29 inch cleithrum to caudal keel measurement.

Response: The East Florida Coast pelagic longline closed area was implemented in 2001 as part of a group of measures, including other time/area closures and live bait restrictions, that were designed, to the extent practicable, to reduce bycatch, bycatch mortality, and incidental catch of undersized swordfish, billfish, and other overfished and protected species caught in the pelagic longline fishery. The analyses on which the closed area were based examined areas that included a relatively large number of discards of swordfish, billfish, bluefin tuna, and pelagic and large coastal sharks compared to the landings of target species such as swordfish, tunas, mahi, and pelagic and large coastal sharks. The analyses did not rely on the 29 inch cleithrum to caudal keel minimum size; however, to some extent the closed area analyses considered dead discards of swordfish and many of those discards were likely undersized swordfish. NMFS is not aware, at this time, how many of those swordfish dead discards in the East Florida Coast area could have met the 25 inch cleithrum to caudal keel and how many would need to be discarded dead. As described above, NMFS does expect the minimum size change from 29 to 25 inch

cleithrum to caudal keel to result in a small increase in swordfish landings across the entire fishery. However, NMFS does not expect the change in swordfish minimum size to impact discards of other species that were also considered in the analyses that resulted in the East Florida Coast closure. Thus, at this time, NMFS does not feel that the change in the cleithrum to caudal keel measurement for the swordfish minimum size from 29 to 25 inches while maintaining the lower jaw fork length minimum size measurement is justification for reconsidering the East Florida Coast or any other pelagic longline closed areas.

#### Changes from the Proposed Rule

No changes have been made to the proposed rule in this final rule.

#### Classification

Pursuant to the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that the final rule is consistent with the 2006 Consolidated HMS FMP and its amendments, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

A final regulatory flexibility analysis was prepared. The final analysis incorporates the initial regulatory flexibility analysis, a summary of the significant issues raised by the public comments in response to the initial analysis, NMFS' responses to those comments, and a summary of the analyses completed to support the action. A summary of the final analysis, addressing each of the requirements in 5 U.S.C. 604(a)(1)-(5) is below. A copy of the full final analysis is available from NMFS (see ADDRESSES).

Section 604(a)(1) of the Regulatory Flexibility Act requires that the Agency describe the need for, and objectives of, the final rule. The purpose of this rulemaking is, consistent with the

2006 Consolidated HMS FMP objectives, the Magnuson-Stevens Act, and other applicable law, to adjust the 2012 annual North and South Atlantic swordfish quotas and implement the management measures contained in Recommendation 11-02, consistent with the Magnuson-Stevens Act and the Atlantic Tunas Convention Act. Under the Atlantic Tunas Convention Act, the United States shall promulgate regulations as may be necessary and appropriate to implement binding recommendations of the Commission. An objective of this action is to adjust the 2012 Atlantic swordfish quotas and implement the management measures contained in Recommendation 11-02 including underharvest carryover provisions, international quota transfer requirements, and a new minimum size measurement for Atlantic swordfish, consistent with the Atlantic Tunas Convention Act, the 2006 Consolidated HMS FMP and other applicable laws.

Section 604(a)(2) requires a summary of the significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis and a statement of any changes made in the proposed rule as a result of such comments. NMFS received numerous comments on the proposed rule during the comment period. A summary of these comments and the Agency's responses are included in the Environmental Assessment and the final rule. Although NMFS did not receive comments specifically on the Initial Regulatory Flexibility Analysis, NMFS received some comments on the economic impacts from the reduction in underharvest carryover limit, international quota transfer, and implementation of the 25 inch cleithrum to caudal keel minimum size.

Most commenters supported implementation of the quota measures, including the reduction in the underharvest carryover limit and quota transfer to Morocco, in order to remain consistent with the Commission's Recommendation. However, a few commenters expressed concern that these quota measures could economically disadvantage U.S. fishermen since they



lower the amount of adjusted quota potentially available for U.S. harvest of swordfish. NMFS does not believe that these concerns warrant a change in preferred alternatives because the United States has not harvested the entire allocated quota in a number of years and is unlikely to do so in the short-term. Consequently, a lower adjusted quota is unlikely to impact U.S. fishermen. Furthermore, these measures are necessary to remain compliant with the Commission. Under the Atlantic Tunas Convention Act, the Secretary shall promulgate such regulations as may be necessary and appropriate to carry out the Commission's recommendations.

Comments regarding the change in the cleithrum to caudal keel minimum size were almost universally supportive. The 25 inch cleithrum to caudal keel minimum size has many advantages such as increased safety at sea and simpler enforcement and compliance. Additionally, commenters noted that the new cleithrum to caudal keel minimum size would have positive economic impacts as well. Storage efficiency would increase allowing fishermen to retain more swordfish, and since the 25 inch cleithrum to caudal keel minimum size provides an equivalent dressed measurement to 47 inch lower jaw fork length fish, would reduce discards. Detailed discussion of these benefits is available in Section 4.0 of the Final Environmental Assessment.

Under Section 604 (a)(3), Federal agencies must provide an estimate of the number of small entities to which the rule would apply. The Small Business Administration (SBA) standards for a "small" versus "large" business entity are entities that have average annual receipts less than \$4.0 million for fish-harvesting; average annual receipts less than \$6.5 million for charter/party boats; 100 or fewer employees for wholesale dealers; or 500 or fewer employees for seafood processors. This action would apply to all participants in the Atlantic

HMS commercial and recreational fisheries that retain Atlantic swordfish. NMFS considers all these participants to be small entities. As of October 2011, 245 vessels held a directed or incidental commercial swordfish permit and are reasonably expected to use pelagic longline gear although they could also use handgear. Also, as of October 2011, 78 vessels held a commercial handgear permit, 23,138 held an Atlantic HMS Angling permit, and 4,194 vessels held an Atlantic HMS Charter/Headboat permit. The Incidental HMS Squid Trawl Permit, which allows for limited retention of swordfish caught in the *Illex* squid trawl fishery, became effective toward the end of 2011. NMFS has preliminary estimates on the number of vessels that may have acquired this permit based on the number of existing *Illex* squid trawl moratorium permit holders. As of August 10, 2010, there were a total of 76 *Illex* squid moratorium permit holders that may have or will avail themselves of this permit (76 FR 49368).

Under Section 604 (a)(4), Federal agencies must provide a description of the projected reporting, recordkeeping, and other compliance requirements of the rule. The action does not contain any new collection of information, reporting, record keeping, or other compliance requirements.

Under section 604(a)(5), agencies are required to describe any alternatives to the rule which accomplish the stated objectives and which minimize any significant economic impacts. These impacts are discussed below. Additionally, the RFA (5 U.S.C. 603 (c)(1)-(4)) lists four general categories of “significant” alternatives that will assist an agency in the development of significant alternatives. These categories of alternatives are:

1. Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

2. Clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
3. Use of performance rather than design standards; and
4. Exemptions from coverage of the rule for small entities.

In order to meet the objectives of this rule, consistent with Magnuson-Stevens Act and Atlantic Tunas Convention Act, NMFS cannot exempt small entities or change the reporting requirements only for small entities because all the entities affected are considered small entities. Thus, there are no alternatives discussed that fall under the first and fourth categories described above. NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson-Stevens Act and Atlantic Tunas Convention Act. Thus, there are no alternatives considered under the third category. As described below, NMFS analyzed several different alternatives in this rulemaking that fall under the second category above and provides rationale for identifying the preferred alternative to achieve the desired objective.

NMFS considered and analyzed the following six alternatives: (1) No Action; (2) Implement Recommendation 11-02, which includes a quota transfer of 112.8 mt dw from the United States to Morocco in 2012 and 2013 and an annual underharvest carryover limit of 25 percent of the base quota (annual carryover limit of 734.4 mt dw); maintain status quo for North Atlantic quotas – Preferred Alternative; (3) Implement the alternative swordfish cleithrum to caudal keel minimum size measurement of 25 inches per Recommendation 11-02 – Preferred Alternative; (4) Use the cleithrum to caudal keel measurement as the sole minimum size and discontinue the use of the lower jaw fork length minimum length standard in U.S. domestic fisheries; (5) Allow the lower jaw fork length minimum size to be applied to swordfish without a

bill, provided the bill has been removed forward of the anterior tip of the lower jaw– Preferred Alternative; and (6) Reintroduce the 33 pound minimum weight standard .

Under Alternative 1, NMFS would not implement any of the measures contained in Recommendation 11-02, including the quota allocation, underharvest carryover limit, international quota transfer, or cleithrum to caudal keel minimum size measurement. Fishermen and dealers would be unlikely to notice any direct economic impacts in the short term if NMFS does not implement the quota portion of Recommendation 11-02, however, they might notice short-term negative impacts if NMFS does not implement the alternative cleithrum to caudal keel minimum size. The U.S. quota specified in Recommendation 11-02 is unchanged from previous years; therefore, the base quota would not be affected. The only effect of non-action would be that the transferred quota would not be deducted from the U.S. base quota. Since the United States has not harvested the entire allocated swordfish quota and is unlikely to do so in the short-term, deducting the transferred quota from the domestic base quota is unlikely to result in changes to annual revenue or revenue to individual vessels. Similarly, if NMFS does not reduce the annual carryover limit from 50 percent to 25 percent, the higher annual adjusted quota is unlikely to be utilized and is unlikely to result in changes in landings or revenue to individual vessels. However, if NMFS does not implement the alternative cleithrum to caudal keel minimum size, there could be minor adverse economic short-term impacts. The 25 inch cleithrum to caudal keel minimum size is equivalent to the existing 47 inch lower jaw fork length minimum size. Currently, fishermen do not have a minimum size measurement that allows for the retention of dressed swordfish that measure at or slightly above 47 inches lower jaw fork length. If a fisherman catches a swordfish that meets the 47 inch lower jaw fork length minimum size but not the current 29 inch cleithrum to caudal keel minimum size, the fisherman must either

land the fish with the head naturally attached or discard the fish. Due to storage capacity limitations and uncertainty in minimum size regulations, fishermen sometimes choose to discard fish that legally meet the 47 inch lower jaw fork length measurement but do not meet the 29 inch cleithrum to caudal keel minimum size. Similarly, dealers sometimes will not accept fish that meet the 47 inch lower jaw fork length measurement but not the 29 inch cleithrum to caudal keel minimum size. These fish are landed with the head naturally attached, but once removed, some dealers have expressed concern that a minimum size violation could occur in the absence of proof that the fish was landed with the head and met the 47 inch lower jaw fork length measurement. For these reasons, if NMFS does not implement the alternative cleithrum to caudal keel minimum size, fishermen would continue to discard and not land some fish that meet the lower jaw fork length minimum size but not the current cleithrum to caudal keel minimum size, resulting in direct short-term minor adverse economic impacts. An analysis of the possible impact to swordfish landings resulting from the implementation of the new 25 inch cleithrum to caudal keel minimum size measurement indicated a possible increase in swordfish landings of 51.4 mt dw (113,316 lbs dw) (Section 4.1). Therefore, if NMFS does not implement the alternative cleithrum to caudal keel minimum size measurement, this would result in forgone revenue totaling \$1,547 (\$499,724 divided by 178 directed swordfish permit holders, 67 incidental swordfish permit holders and 78 swordfish handgear permit holders) per vessel annually. As such, these permit holders would likely experience minor adverse economic impacts if the cleithrum to caudal keel minimum size was not changed to 25 inches. Because the United States has an obligation to implement the Commission's recommendations under Atlantic Tunas Convention Act, NMFS does not prefer this alternative at this time.

Alternative 2, the preferred alternative, would implement the Commission's Recommendation 11-02 provisions pertaining to quota allocation, the underharvest carryover limit, and the quota transfer to Morocco. Alternative 2 would likely have neutral economic impacts to small entities in the short-term. As noted in the discussion for Alternative 1, the United States is unlikely to achieve 100 percent quota utilization in the short-term. Consequently, minor changes to the base quota through international quota transfers or to the adjusted quota through reduced underharvest carryover limits are unlikely to impact swordfish fishing effort levels or annual revenues. However, Alternative 2 could have minor adverse economic impacts if the U.S. swordfish fishery nears 100 percent quota utilization. At that time, an adjusted quota that reflects the annual international quota transfer to Morocco and the lower underharvest carryover limit could lead to a lower available quota than the level possible under Alternative 1. This lower level of adjusted quota would result in a decrease in the total possible fishery-wide annual revenue. If NMFS deducts the 112.8 mt dw quota transfer from the U.S. base quota of 2,937.6 mt dw and limits underharvest carryover to 25 percent, the total U.S. adjusted quota could reach 3,559.2 mt dw (7,846,612 lbs dw). Assuming an average ex-vessel price of \$4.41 per pound (NMFS 2011) and 100 percent quota utilization, total possible gross revenues across the domestic fishery would be estimated to be \$34,603,559 under Alternative 2. Therefore, Alternative 2 could result in annual gross revenues that are \$8,236,720 less (\$42,840,279 - \$34,603,559) than the possible annual gross revenues under Alternative 1. This potential decrease in average annual ex-vessel revenue across all swordfish permit types is \$25,501 per vessel (\$8,236,720 / (178 directed swordfish permit holders, 67 incidental swordfish permit holders, and 78 swordfish handgear permit holders)). Since retention limits are higher for directed permit holders than incidental permit holders, actual per vessel revenue loss would

likely be higher for directed permit holders and lower for incidental permit holders. Handgear permit holders do not have a retention limit, however, the gear used by these permit holders is less efficient, therefore, actual per vessel revenue loss is somewhere in between directed and incidental permit holders. The United States, however, is required to implement these measures in order to be in compliance with the Commission's recommendation 11-02 under the Atlantic Tunas Convention Act, therefore, we prefer this alternative at this time.

Under Alternative 3, the preferred alternative, NMFS would implement the swordfish minimum size portion of Recommendation 11-02 which allows a 25 inch cleithrum to caudal keel measurement. This alternative would likely have moderate beneficial economic impacts in both the short- and long-term. The 25 inch cleithrum to caudal keel minimum size is equivalent to the existing 47 inch lower jaw fork length minimum size. Currently, fishermen do not have a minimum size measurement that allows for the retention of dressed swordfish that measure at or slightly above 47 inches lower jaw fork length. If a fisherman catches a swordfish that meets the 47 inch lower jaw fork length minimum size but not the current 29 inch cleithrum to caudal keel minimum size, the fisherman must either land the fish with the head naturally attached or discard the fish. Due to storage capacity limitations and uncertainty in minimum size regulations, fishermen sometimes choose to discard fish that legally meet the 47 inch lower jaw fork length measurement but do not meet the 29 inch cleithrum to caudal keel minimum size. Similarly, dealers sometimes will not accept fish that meet the 47 inch lower jaw fork length measurement but not the 29 inch cleithrum to caudal keel minimum size. These fish are landed with the head naturally attached, but once removed, some dealers have expressed concern that a minimum size violation could occur in the absence of proof that the fish was landed with the head and met the 47 inch lower jaw fork length measurement. For these reasons, implementing the Commission's

alternative minimum cleithrum to caudal keel size of 25 inches could lead to increased retention of previously discarded legal fish that measure at or slightly above 47 inches lower jaw fork length, since this cleithrum to caudal keel minimum size is equivalent to a greater number of 47 inch lower jaw fork length fish. Fish in this size range are the most frequently encountered fish; note that the figures provide lengths in centimeters, therefore, increased landings of fish in this size range are not trivial. The increase in retained catch could lead to increased annual revenues for both fishermen and dealers, resulting in direct moderate beneficial economic impacts in both the short and long-term. NMFS estimated this additional revenue to be \$1,547 per swordfish permit holder annually under this alternative. These permit holders would likely experience minor beneficial economic impacts if the cleithrum to caudal keel minimum size is changed to 25 inches. Because this alternative provides these benefits to fishermen but does not lead to increased mortality of undersized swordfish, NMFS prefers this alternative at this time.

Under Alternative 4, NMFS would use the cleithrum to caudal keel measurement as the sole minimum size and discontinue the use of the lower jaw fork length minimum size in U.S. domestic fisheries. This alternative would be unlikely to have any direct socioeconomics in the short or long-term, provided that the new Commission's alternative cleithrum to caudal keel minimum size of 25 inches is implemented under Alternative 4. The current lower jaw fork length minimum size of 47 inches and the proposed cleithrum to caudal keel minimum size of 25 inches equate to the same size fish in the majority of instances. Therefore, the lower jaw fork length minimum size could be redundant with the cleithrum to caudal keel minimum size. Removal of the lower jaw fork length minimum size and use of only the cleithrum to caudal keel measurement could simplify enforcement and compliance with minimum size requirements. Additionally, since the two minimum sizes refer to the same size fish, removal of the lower jaw



fork length minimum size is unlikely to result in increased landings for individual vessels. However, removing one of the minimum size measurements could reduce flexibility for fishermen in how they choose to measure and land swordfish; therefore NMFS does not prefer this alternative at this time.

Under Alternative 5, the preferred alternative, NMFS would allow the lower jaw fork length minimum size to be applied to swordfish without a bill, provided the bill has been removed forward of the anterior tip of the lower jaw. Adoption of Alternative 5 would likely result short and long-term minor beneficial economic impacts. Swordfish are currently measured using either the lower jaw and fork of the tail (in the case of lower jaw fork length) or the cleithrum and caudal keel (in the case of cleithrum to caudal keel) as endpoints. Neither of these measurement methods require the bill of the swordfish to be attached, therefore, the bill is unnecessary in determining if a swordfish is of legal size. The bill of a swordfish can complicate fishing operations by presenting safety concerns and imposing storage capacity costs. If NMFS allows fishermen to continue to employ the lower jaw fork length measurement in the absence of the bill, commercial vessels could more efficiently pack the swordfish catch, leaving more room for additional product. This additional product could increase revenues for both fishermen and dealers, although quantifying the economic benefits on a per-vessel basis is not possible. NMFS prefers Alternative 5 at this time.

Under Alternative 6, NMFS would reintroduce the 33 pound minimum weight standard. This alternative would be unlikely to have any net economic impacts in the short or long-term, provided that the new Commission's alternative cleithrum to caudal keel minimum size of 25 inches is implemented under Alternative 4. As discussed in the Environmental Assessment, NMFS employed the 33 pound minimum weight, in combination with two minimum lengths,

until 2009. At that time, we removed the 33 pound minimum weight and specified landing condition-specific minimum sizes. The impetus for this change was twofold. First, the use of three minimum sizes (weight, lower jaw fork length, and cleithrum to caudal keel) complicated minimum size enforcement because all three measurements had to be taken to prove that a fish was undersized. This can require heavy time investments, particularly in cases with thousands of pounds of swordfish. Second, neither enforcement agents nor fishermen could definitively determine the accurate weight and subsequent legality of fish while at sea, presenting both compliance and enforcement problems. To address these enforcement and compliance complexities, NMFS simplified the swordfish minimum size requirements by removing the 33 pound minimum weight and specified landing condition-specific minimum lengths.

Reintroducing the minimum dressed weight could provide some benefits and some disadvantages. The 33 pound minimum weight and the proposed 25 inch cleithrum to caudal keel minimum size equate to the same size fish in the majority of instances. The primary benefit is that fishermen might be able to retain more swordfish because some fish meet the minimum weight but not the minimum length. Reintroducing the minimum weight could provide the opportunity to retain these fish, as demonstrated in the Environmental Assessment.

Disadvantages include those discussed above, including the enforcement and compliance difficulties. Since a definitive weight cannot be taken at sea, fishermen are unlikely to be able to determine the legality of swordfish weighing near 33 pounds. This presents uncertainties and compliance difficulties. The possible benefits and possible disadvantages, when taken together, result in neutral economic impacts across the fishery and to individual vessels. Additionally, since the 33 pound minimum weight and the proposed 25 inch cleithrum to caudal keel minimum size equate to the same size fish in the majority of instances, reintroducing the minimum weight

standard could be unnecessary. Since Alternative 7 poses enforcement and compliance concerns, and because the economic impacts may be neutral compared to the beneficial economic impacts under Alternatives 4 and 6, NMFS does not prefer this alternative at this time. However, should the enforcement and compliance issues be resolved in the future, NMFS may reconsider reintroduction of the 33 pound minimum weight standard.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. Copies of this final rule and compliance guide are available upon request from NMFS or on the webpage (see ADDRESSES).

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: July 25, 2012.

---

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries,

performing the functions and duties of the

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 635 is amended as follows:

PART 635-ATLANTIC HIGHLY MIGRATORY SPECIES

1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 et seq.; 16 U.S.C. 1801 et seq.

2. In § 635.2, the “LJFL” and “Naturally attached” definitions are revised to read as follows:

§ 635.2 Definitions.

\* \* \* \* \*

LJFL (lower jaw-fork length) means the straight-line measurement of a fish from the anterior tip of the lower jaw to the fork of the caudal fin. The measurement is not made along the curve of the body.

\* \* \* \* \*

Naturally attached, as it is used to describe shark fins, refers to shark fins that remain attached to the shark carcass via at least some portion of uncut skin. As used to describe the head of a swordfish, naturally attached refers to the whole head remaining fully attached to the carcass except for the bill, which may be removed provided it has been removed forward of the anterior tip of the lower jaw.

\* \* \* \* \*

3. In § 635.20, paragraph (f)(2) is revised to read as follows:

§ 635.20 Size limits.

\* \* \* \* \*

(f) \* \* \*

(2) If the head of a swordfish is no longer naturally attached, the CK measurement is the sole criterion for determining the size of a swordfish. No person shall take, retain, possess, or land a dressed North or South Atlantic swordfish taken from its management unit that is not equal to or greater than 25 inches (63 cm) CK length. A swordfish that is damaged by shark bites may be retained only if the length of the remainder of the carcass is equal to or greater than 25 inches (63 cm) CK length.

\* \* \* \* \*

4. In § 635.27, paragraphs (c)(1)(i)(A), (c)(1)(i)(D), (c)(2)(ii), and (c)(3)(ii) are revised to read as follows:

§ 635.27 Quotas.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) \* \* \*

(A) A swordfish from the North Atlantic stock caught prior to the directed fishery closure by a vessel for which a directed fishery permit, or a handgear permit for swordfish, has been issued or is required to be issued is counted against the directed fishery quota. The total baseline annual fishery quota, before any adjustments, is 2,937.6 mt dw for each fishing year. Consistent with applicable ICCAT recommendations, a portion of the total baseline annual fishery quota may be used for transfers to another ICCAT contracting party. The annual directed category quota is calculated by adjusting for over- or underharvests, dead discards, any applicable transfers, the incidental category quota, the reserve quota and other adjustments as needed, and is

subdivided into two equal semi-annual: one for January 1 through June 30, and the other for July 1 through December 31.

\* \* \* \* \*

(D) Fifty (50) mt of the annual fishery quota of North Atlantic swordfish may be held in reserve for inseason adjustments to fishing categories, to compensate for projected or actual overharvest in any category, for fishery research, or for other purposes consistent with management objectives.

\* \* \* \* \*

(2) \* \* \*

(ii) If NMFS determines that the annual incidental catch quota will not be taken before the end of the fishing year, excess quota may be allocated to the directed fishery quota or to the reserve, as necessary. If NMFS determines that the annual directed catch quota will not be taken before the end of the fishing year, some of the excess quota may be allocated to the incidental fishery quota or to the reserve, as necessary.

\* \* \* \* \*

(3) \* \* \*

(ii) If consistent with applicable ICCAT recommendations, total landings above or below the specific North Atlantic or South Atlantic swordfish annual quota will be subtracted from, or added to, the following year's quota for that area. As necessary to meet management objectives, such carryover adjustments may be apportioned to fishing categories and/or to the reserve. Carryover adjustments for the North Atlantic shall be limited to 25 percent of the baseline quota allocation for that year. Carryover adjustments for the South Atlantic shall be limited to 100 mt ww (75.2 mt dw) for that year. Any adjustments to the 12-month directed fishery quota will be

apportioned equally between the two semiannual fishing seasons. NMFS will file with the Office of the Federal Register for publication any adjustment or apportionment made under this paragraph.

\* \* \* \* \*

[FR Doc. 2012-18672 Filed 07/30/2012 at 8:45 am; Publication Date: 07/31/2012]